83-581

No.

Office-Supreme Court, U.S.
FILED
OCT 7 1983
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

HAROLD HAIMOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. In a criminal prosecution where the government, in rebuttal, after the defendant has testified on his own behalf, is permitted to call two witnesses who testified about the defendant's reputation for untruthfulness and their opinion about his untruthfulness, is the refusal to permit the defendant to introduce evidence of his truthful character a violation of Rule 608(a) of the Federal Rules of Evidence and the Constitution's guarantee of due process of law?

II. Under Illinois v. Gates and Franks v. Delaware, when the government has knowledge of facts which show that its informant is neither credible nor reliable and

intentionally omits those facts from an affidavit in support of a search warrant, is the warrant invalid?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is reported at 706 F.2d 1549 (11th Cir.1983), and is reprinted in the Appendix at A-1. The opinion of the Court of Appeals for the Eleventh Circuit on petitioner's application for rehearing/rehearing en banc is reported at --- F.2d --- (11th Cir.1983), and is reprinted in the Appendix at A-49.

JURISDICTION

The judgment of the Court of Appeals was enterd on June 13, 1983. On August 15, 1983, the Court of Appeals denied a petition for rehearing/rehearing en banc. The Court has jurisdiction to review the judgment by writ of certiorari pursuant to 28 U.S. §1254(1).

STATUTES INVOLVED

Rule 608(a) of the Federal Rules of Evidence provides:

> Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

STATEMENT OF THE CASE

Petitioner Harold Haimowitz, a Jacksonville lawyer of long standing, was indicted and charged with a conspiracy to violate 18 U.S.C. §§1014, 1002, 1001 and 656 and substantive violations of the first three of those statutes. The charges arose out of an alleged scheme to defraud the United States government by obtaining a Small Business Administration (SBA) loan through fraud and with false documents and by misapplication of the proceeds of the loan.

Upon trial, the jury found the Petitioner guilty on each count in which he was named. Three co-defendants were found not guilty on all charges.

A total committed sentence of five years was imposed, along with a fine of $20,000, and two years probation to commence upon Petitioner's release from confinement.

On appeal, the Court of Appeals for the Eleventh Circuit affirmed (A-1). Motions for rehearing/rehearing en banc (A-49) and for stay of the mandate were denied. A motion to this Court for release pending appeal and application for a writ of certiorari was denied by this Court (Powell, J.) on or about September 10, 1983.

STATEMENT OF FACTS

Petitioner was retained by Peter Abbott to assist him and his wife Jean Abbott in the purchase of a Jacksonville restaurant. An SBA loan package was prepared by one Robert Flude of Atlanta, not by Petitioner

Haimowitz. The proposal and supporting documents were submitted by Peter Abbott, not by Petitioner Haimowitz, to the American National Bank which approved an SBA-guaranteed loan to Abbott's Restaurant, Inc. in the amount of $450,000. The purpose of the loan was to complete the purchase of the restaurant and to pay for renovations.

The indictment charged that certain documents submitted to the bank to induce it to make the loan and to release monies under the loan agreement were forged, false, or otherwise fraudulent.

All of the charges against the Petitioner were predicated substantially upon the testimony of Peter Abbott. Abbott had engaged since 1972 in numerous criminal activities involving fraudulent bank loans, had

obtained two prior fraudulent SBA loans, had engaged in arson, narcotics trafficking, procuring for prostitution and had committed numerous other criminal acts. Abbott had testified in a federal prosecution in Boston in exchange for immunity for all prior criminal acts. In the Boston case, which involved a fraudulent SBA loan, Abbott accused his Boston lawyer of helping prepare the fraudulent documents just as he accused Haimowitz in the instant case. The Boston attorney was indicted but the indictment was dismissed.

While a participant in the federal witness protection program in Huntsville, Alabama, Abbott continued to practice his criminal craft on

Huntsville's residents. Upon his arrival in Jacksonville, he repeated that pattern.

In April 1980, Peter Abbott, having been put in touch with federal authorities in Jacksonville through government agents in Boston, began to cooperate. In August of that year, on the basis of an affidavit of an FBI agent based largely upon information provided by Abbott, a search warrant was obtained for Petitioner's law officer. A motion to suppress was denied and documents seized from his office and files were used in evidence against him.

At trial Haimowitz testified on his own behalf, admitting his participation in the preparation of some of the loan documents, but denying any knowledge of the falsity of the facts upon which

Abbott was seeking the SBA loan. He denied any knowledge that a criminal scheme existed.

After Haimowitz testified, the prosecution, over objection, called two witnesses in rebuttal, Herbert Kanning, a Jacksonville attorney who had known Haimowitz for ten years, and Thomas D. Treece, another Jacksonville attorney who had been an associate of Haimowitz in Haimowitz' law practice. Both testified that the defendant's reputation for truthfulness and veracity was not good and as to their own poor opinion of defendant's truthfulness. The government announced the close of its case, and the court, without asking the defendants whether they had any additional evidence to present, informed the jury that no further testimony would be presented.

Defendant immediately advised the court that he desired to present reputation witnesses in rebuttal. The request was denied by the court, and the jury was dismissed for the day. The following day, Haimowitz again requested the opportunity to present character witnesses who were then available and waiting outside the courtroom. His renewed request was denied.

REASONS FOR GRANTING THE WRIT

I. RULE 608 OF THE FEDERAL RULES OF EVIDENCE AND THE FIFTH AMENDMENT'S GUARANTEE OF DUE PROCESS OF LAW WERE VIOLATED BY THE REFUSAL TO PERMIT DEFENDANT TO INTRODUCE EVIDENCE OF HIS REPUTATION FOR TRUTHFULNESS AFTER THE PROSECUTION PRODUCED WITNESSES WHO TESTIFIED ABOUT HIS REPUTATION FOR UNTRUTHFULNESS.

The Court of Appeals for the Eleventh Circuit ruled that whether to permit a criminal defendant to introduce evidence of his truthfulness after his veracity has been attacked through prosecution witnesses is a matter for the trial court's discretion, and upheld the trial court's refusal to permit the defendant's witnesses to testify. That ruling runs directly counter to Rule 608(a) of the Federal Rules of Evidence and denied the defendant due process of law.

The court's ruling appears to be in conflict not only with other rulings within that Circuit,[1] but with the general understanding of Rule 608(a) by the federal courts and with this Court's decisions regarding the Constitution's guarantee of due process. If that ruling is permitted to stand, the Petitioner will stand convicted after a trial which was fundamentally unfair. More important for present purposes, every criminal defendant who opts to testify on his own behalf will run the risk that evidence about his poor reputation for honesty will be introduced against him and, in the judge's discretion, he will not be allowed to rebut such testimony.

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[1] See United States v. Jackson, 588 F.2d 1046 (5th Cir.), cert. denied, 442 U.S. 941 (1979); United States v. Hewitt, 634 F.2d 277 (5th Cir. 1981); United States v. Danehy, 680 F.2d 1311 (11th Cir. 1982).

This would have a chilling effect upon his willingness to testify. That this is a powerful and wholly unjustifiable deterrent to testifying on one's own behalf cannot be gainsaid.

Rule 608(a), which permits a party to attack a witness' credibility by opinion or reputation evidence going to the witness' character for truthfulness, also provides that after a witness' character for truthfulness has been attacked, evidence of his truthful character is admissible. The principle seems so sound and is so well extablished that Weinstein & Berger, citing only McCormick on Evidence, state unequivocally "Courts, commentators and Rule 608 agree that a witness may offer evidence of his good character for truth if reputation or opinion evidence of his bad character

has been admitted." 3 Weinstein & Berger, Weinstein's Evidence ¶608[08] at 608-46. Here, the trial court permitted the prosecution to attack, but prevented the defendant from defending.

The Court of Appeals for the Second Circuit, discussing the conditions under which evidence of poor reputation for truth and veracity may be offered by the government to impeach the credibility of a defendant who has taken the stand in his own defense, has correctly suggested that such evidence should be viewed by the trial judge with caution, and should be rejected except in the rare case where the testimony appears to be well supported. "Being at best in the nature of unsubstantiated community gossip, the probative value of such evidence is

doubtful when weighed against the prejudice that it might create in the minds of jurors." United States v. Augello, 452 F.2d 1135, 1140 (2d Cir. 1971), 406 U.S. 922 (1972). Be that as it may, it is surely only fair that, if the government is permitted to introduce such evidence, the defendant must be afforded an opportunity to rebut it.

In In re Oliver, 333 U.S. 257, 273 (1948), this Court stated:

> The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts, as well as the prosecution's, to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

In short, as this Court stated in Chambers v. Missippippi, 410 U.S. 284, 302 (1973):

> Few rights are more fundamental than that of an accused to present witnesses in his own defense.

See also Washington v. Texas, 388 U.S. 14 (1967). In this case, that fundamental right was infringed upon and the infringement was justified on grounds that can only be deemed frivolous.

The Court of Appeals' reasoning upholding the trial count's ruling does not withstand careful, or even casual, scrutiny. It held that "surrebuttal" is a matter within the discretion of the court, and that that discretion had not been abused. But, given the structure of the Federal Rules of Evidence and those Rules' limitation on the timing and use of truthfulness

testimony, to frame the issue as did the Court of Appeals is make Rule 608 a nullity. Because a defendant may not introduce evidence of his reputation for truthfulness under Rule 608 until his reputation has been attacked, Petitioner could not have called his good character witnesses until after the prosecution had called its character witnesses.[2] See, e.g.,

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[2] Perhaps the courts below confused Rule 404 and Rule 608. Rule 404 provides in part:

> (a) Character evidence generally.-- Evidence of a person's character or a trait of character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> (1) Character of accused.-- Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;

Some of Haimowitz' co-defendants had taken advantage of this Rule and presented character witnesses on

United States v. Cylkouski, 556 F.2d 799, 801-02 (6th Cir. 1977).[3] And because the prosecution could only have called those witnesses after the defendant had testified, that is, on

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their behalf. Perhaps the trial court believed that Haimowitz too should have presented his character witnesses, as his co-defendants had, under Rule 404 in his case in chief and thus that his proffer of character witnesses came too late. If that was the courts' thinking, then it was based on a fundamental misunderstanding of the different purposes served by Rule 404 and Rule 608. Haimowitz may have elected not to put in good character evidence so as not to throw open the entire subject of his character. See Michelson v. United States, 335 U.S. 469 (1948). But once the prosecution introduced testimony about Haimowitz' alleged lack of veracity under Rule 608, under that same rule, Haimowitz surely was entitled to an opportunity to respond.

[3] Indeed, an earlier draft of the Rule would have permitted an accused who testifies on his own behalf to buttress his character for veracity even before it was attacked, but that portion of the proposed Rule was deleted after the Department of Justice objected. See 3 Weinstein &

rebuttal, the opportunity to present truthfulness testimony will only and always arise as "surrebuttal."

The Court of Apeals stated that the defendant, by taking the stand, had put his credibility in issue; that the prosecution's "lack of credibility" witnesses thus raised no "new" issue; and that surrebuttal by the defendant was therefore inappropriate. But this characterization of the issue wholly eliminates the right afforded by Rule 608 and in every case renders it a complete nullity. The prosecution may only attack the credibility of a witness-defendant after that witness has testified. If that attack on credibility raises no "new issue" and if the raising of a "new issue" is a prerequisite to the introduction of

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Berger, Weinstein's Evidence, ¶608[02] at 608-13.

surrebuttal testimony, then the defendant can never take advantage of the Rule which renders admissible evidence of his truthful character.[4]

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[4] Even if the issue can be characterized as one calling for the exercise of the trial judge's discretion, that discretion was clearly abused in this case. The defendant's evidence as to his good reputation, given the testimony against him, would not have been cumulative, confusing, or prejudicial. Indeed, it was the government's evidence which, left uncontroverted, was confusing to the jury and prejudicial to the defendant. The effect this had may be shown by the fact that the other three defendants were acquitted.

Nor can it be said that, because the trial court had announced that the evidence was closed, refusal to reopen was justified on the particular facts of this case. The trial court surely had the power to "reopen" the case, see, e.g., United States v. Keller, 523 F.2d 1009 (9th Cir. 1975), and its refusal to do so was prejudicial error of Constitutional dimension.

The trial court suggested that, because it had told the jury that the evidence was closed after the government's witnesses had testified on rebuttal, re-opening to permit

The question presented is not merely a technical one going to a trial judge's power to oversee the order of proofs and the course and conduct of trial. The question is far more basic and farreaching--directly implicating the operation of Rule 608 of the Federal Rules and the fundamental guarantee that a criminal defendant be given an opportunity to rebut the evidence offered against him. The functioning of the federal courts and the interests of justice in this

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defendant's witnesses to testify would have given that testimony too much weight in the eyes of the jury. But surely an instruction to the jury would have "cured" whatever harm the court's announcement had done. As it stood, the last thing heard by the jury was testimony about the defendant's poor reputation for truthfulness. That is the evidence which, left unrebutted, was no doubt given too much weight by the jury as shown by the fact that Haimowitz alone was convicted.

particular case and in all federal criminal prosecutions mandate that this Court grant the writ of certiorari and review the decision of the court below.

II. UNDER ILLINOIS V. GATES AND FRANKS V. DELAWARE, WHEN THE GOVERNMENT HAS KNOWLEDGE OF FACTS WHICH SHOW THAT AN INFORMANT IS NEITHER CREDIBLE NOR RELIABLE AND INTENTIONALLY OMITS THOSE FACTS FROM AN AFFIDAVIT IN SUPPORT OF A SEARCH WARRANT, THE WARRANT IS INVALID

Pursuant to a search warrant, a search was conducted of Petitioner Haimowitz' law office. Among the items seized were legal files pertaining to Peter Abbott's SBA application and loan, the incorporation of Abbott's Restaurant, and various suits against Abbott's Restaurant by its creditors; Petitioner's records of telephone messages; copies of his correspondence; and a typewriter.[5]

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[5] This typewriter was alleged by Haimowitz' former secretary, Judi Greenhut, to be the typewriter she used to prepare a false receipt at Haimowitz' request. The FBI expert who examined the machine at FBI headquarters was called by Petitioner and testified that the document could not have been prepared on that machine.

The affidavit in support of the search warrant was signed by an agent of the Federal Bureau of Investigation and was based primarily on information provided him by Peter Abbott. The affidavit contained not a single averment on the affiant's part as to Peter Abbott's reliability or credibility, which is not surprising since the affiant surely knew that his informant was about as unreliable a person as has ever been known--an incorrigible liar and a convicted felon.

The district court denied a motion to suppress the evidence seized pursuant to the search warrant, and the Court of Appeals, which ruled prior to this Court's decision in Illinois v. Gates, 103 S.Ct. 2317 (1983), upheld that decision, stating that the

affidavit satisfied the requirements of Spinelli v. United States, 393 U.S. 410 (1969), and Aguilar v. Texas, 378 U.S. 108 (1964), as to the reliability of the information provided by the informant and the credibility of the informant himself. It further held that no hearing was required under Franks v. Delaware, 438 U.S. 154 (1972), because the defendant's allegations that the affiant had misled the magistrate were "conclusory."

After Gates was decided, Petitioner moved for rehearing based on that case which had expressly abandoned the rigid two-pronged test of Aguilar and Spinelli and substituted a "totality of the circumstances" approach for determining whether an affidavit established probable cause for the issuance of a search warrant. The

Court of Appeals for the Eleventh Circuit, in a short per curiam opinion, "re-examined the totality of circumstances surrounding the issuance of the search warrant . . . and conclude[d] that the affidavit supporting that search warrant was sufficient." (A-51-52)

Petitioner's claim with respect to the affidavit submitted in support of the search warrant is simple. The government knew Peter Abbott's history of past crimes. It knew that Abbott had engaged in almost identical fraudulent practices even going so far as to have accused his prior Boston attorney of similar misdeeds before he ever met the defendant. It knew that Abbott had a motive for pointing the finger at the defendant. The legal claim which Petitioner has raised is

thus that, when the government has knowledge of facts which show that an informant is neither credible nor reliable, it may not intentionally omit those material facts from an affidavit.

Under the "totality of circumstances" analysis adopted by this Court in Gates, the intentional omission of material facts concerning the informant's known lack of credibility by the FBI becomes even more significant than it was under Aguilar and Spinelli. As Justice Rehnquist iterated and reiteratd throughout the Gates opinion, the informant's "veracity" and "reliability" are hightly relevant in determining the value of his report. See, e.g., Illinois v. Gates, supra, 103 S.Ct. at 2332, n.11.

The paying of great deference by reviewing courts to the magistrate's determination presupposes, of course, that the magistrate has exercised common sense. It is not a reflection upon the magistrate if he errs because he is misled by a failure to provide him with relevant information. To the contrary, increased deference to and reliance upon the magistrate's judgment require that those providing him information be obligated to provide the relevant information. A long history of criminal behavior and comparable frauds by an informant, including an almost identical accusation of a Boston attorney in order to secure immunity from prosecution, is surely relevant from a common sense point of view before a finding of probable cause can be had to issue a warrant to search a

lawyer's law office. What the FBI knows about the credibility of its informant cannot be omitted in order to bolster a claim of probable cause.

In Franks v. Delaware, 438 U.S. 154 (1972), this Court held that a warrant based on an affidavit which is intentionally or recklessly false is invalid unless, setting aside the false material, the affidavit is sufficient to establish probable cause. The omission of any reference to Abbott's known lack of credibility is, for analytical purposes, identical to an affirmative false statement. See United States v. Lefkowitz, 464 F.Supp. 227, 233 (C.D.Cal. 1979), aff'd, 618 F.2d 1313 (9th Cir.), cert. denied, 449 U.S. 824 (1980).

The Eleventh Circuit rejected the Franks v. Delaware claim asserting that it was based on "conclusory allegations unsupported by an offer of proof." With all due deference to the Court of Appeals, in the context of this case and upon the record below, this assertion is difficult to understand.

The defendant's allegations, even as described by the Court of Appeals (A-25-26), were far from conclusory. Given that all relevant information was in the exclusive possession of the government and its informant, there is nothing more that defendant could have shown when the issue arose. And testimony at trial fully confirmed his allegations. At trial, the evidence showed that Peter Abbott's agreement to cooperate with the FBI resulted from Abbott's discussions with FBI agents in

Boston where he was testifying in a criminal case about his involvement in a similar criminal scheme. Abbott was a participant in the Department of Justice witness protection program. His criminal record and his involvement with the FBI and the Department of Justice pervaded the entire prosecution. It is inconceivable that the Government would or could deny that the FBI had knowledge of Abbott's criminal record and involvement with SBA frauds.

In fact, the Government did not deny that it knew of Abbott's criminal record and did not deny that it had intentionally withheld that information from the magistrate. Under these circumstances, the Court of Appeals'

suggestion that Petitioner should have made an "offer of proof" is to elevate form over substance.

The issue here is simply whether when the Government has knowledge that the informant's credibility is suspect it may intentionally fail to provide that information to the magistrate. The Government never denied that it had such information. Nor did it deny that it refused to provide that information to the magistrate.

At the very least, then, pursuant to Franks v. Delaware, supra, a hearing must be held to allow the defendant to prove what is almost indisputable, namely, that the FBI affidavit intentionally or recklessly withheld information material to the issue of probable cause. When that is shown, the only remaining question under

Franks is whether the affidavit, without the misleading material--that is, without the information provided by Peter Abbott--establishes probable cause. Petitioner contends that it surely does not.

It is respectfully submitted that this Court cannot condone either intentional or reckless misleading of a magistrate by the omission by an FBI agent of known essential information concerning the informant's proven lack of credibility. If the opinion of the Eleventh Circuit is allowed to stand, it will act as an open invitation to the FBI and other government agents to withhold essential information from the magistrate and will render the exercise of the magistrate's common sense judgment--fundmental under Gates v. Illinois--a complete and utter sham.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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October 4, 1983

APPENDIX

UNITED STATES of America,
Plaintiff-Appellee,

v.

HAROLD HAIMOWITZ, Defendant-Appellant

No. 81-6011

United States Court of Appeals,
Eleventh Circuit.

June 13, 1983

Appeal from the United States District
Court for the Middle District of
Florida

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and PITTMAN,[1] District Judge.

PITTMAN, District Judge:

In this case the defendant appeals his conviction on one count for conspiracy and on eight substantive counts for possession of false and fraudulent documents in connection with the fraudulent obtaining and misapplication of proceeds of a Small Business Administration (SBA) loan. The defendant raises numerous issues on appeal. We consider the defendant's points seriatim and affirm his conviction.

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[1] Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

Appellant Harold Haimowitz, Irving R. Bowen, Jr., Frederick W. Bower, Frederick E. Bacon, Harold Bloom, and Sam L. Silberstein were indicted on January 23, 1980. It was an eighteen count indictment. Two of the defendants, Irving R. Bowen, Jr. and Frederick W. Bower, were subsequently severed; as a result of these severances, counts twelve and eighteen of the original indictment were severed. Of the remaining sixteen counts the appellant, Harold Haimowitz, was charged in nine counts either individually or with one of the defendants with criminal acts occurring from on or about October 1, 1979 through August 31, 1980.[2]

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[2] Count One of the indictment charged that:

In late September or early October, 1979, Peter Abbott contacted appellant Harold Haimowitz, a Jacksonville attorney, for assistance in the purchase of a restaurant in the

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> Defendants herein, and Peter Abbott, did knowingly and willfully conspire, combine, confederate and agree among themselves, and with others, both known and unknown to the grand jury, to defraud the United States, that is, the Small Business Administration, an agency of the United States, and to violate the laws of the United States, to-wit:
>
> a) To make material false statements and reports in applications for loans and advances, for the purpose of influencing the action of the bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 1014.
>
> b) To possess false, forged, altered and counterfeit writing and documents, with the intent to defraud the United States and

Jacksonville area. Within a few days Abbott met Haimowitz at his law office and told him he was looking for a restaurant in the $50,000 to $100,000 price range. Haimowitz telephoned an

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agencies thereof, and for the purpose of enabling another to obtain money from the United States or an agency thereof, in violation of Title 18, United States Code, Section 1002.

c) To make and use a false writing and document knowing the same to contain false, fictitious and fraudulent statements and entries in matters within the jurisdiction of the Small Business Administration, an agency of the United States, in violation of Title 18, United States Code, Section 1001.

d) To misapply more than $100 of the monies, funds and credits of a bank, the deposits of which were then insured by the Federal Deposit Insurance Corporation, by an officer and employee of said bank, in reckless disregard of the interests of said bank, in violation of Title 18, United States Code, Section 656.

associate who was chairman of the zoning board and requested he show Abbott some available restaurants. Abbott was shown several restaurants, including Swain's Charbroiled

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Among the manner and means by which the defendants would and did carry out the conspiracy were the following:

1) Defendant, Harold Haimowitz, used his position as an attorney, past experience in business and real estate, and knowledge of the community to: create false, fictitious and fraudulent documents, writings, applications and reports; recruit necessary, willing and cooperative persons and firms to join the conspiracy; provide the legal documents, contracts and writings, both true and false which were essential to the conpiracy; counsel, advise and oversee the general operation of the conspiracy; induce and inveigle innocent third parties to rely and act upon the representations, pretenses, promises and documentation provide by the conspirators.

* * * * * *

Steakhouse. Because Swain's was in the $300,000 to $325,000 price range, Abbott was told to recontact Haimowitz. When Abbott informed Haimowitz about Swain's, Haimowitz said he might invest in it personally and wanted to inspect the building. When Abbott protested that it was impossible for him to produce the purchase price, Haimowitz told him not to worry.

Abbott and Haimowitz inspected Swain's and returned to Haimowitz's law office. Haimowitz told Abbott that he would take 10% ownership of the restaurant and that a loan could be obtained from the SBA for the purchase and renovation. Abbott then told Haimowitz that he could not apply for

an SBA loan because he previously had gone into bankruptcy and was a convicted felon of vehicular homicide. While Abbott was a convicted felon, he had not been convicted for vehicular homicide. Abbott testified on cross-examiration that he had been involved in numerous criminal acts involving other false and fraudulent SBA loans, acts of arson, and trafficking in narcotics. Nevertheless, Abbott agreed to have an SBA loan "package" prepared by Robert Flude of Atlanta while Haimowitz agreed to obtain an estimate from a contractor, to draft the purchase agreement, and to obtain an equipment appraisal and an insurance breakdown.

In November, 1979, Haimowitz and Abbott met with a representative of Swain's Charbroiled Steakhouse, at which time Haimowitz negotiated the selling price of the restaurant. Abbott then obtained a loan package from Flude, giving Flude false information about his background. In addition to the false information provided by Abbott, Haimowitz telephoned Flude and directed some changes in the information supplied by Abbott in order to make the SBA package more attrative. Abbott received the final SBA package from Flude and took it to Haimowitz's office, where Haimowitz provided the purchase agreement, appraisals of the land, building and equipment, an insurance

breakdown, and an inflated estimate for the renovation work. Abbott and Haimowitz also prepared and included a fraudulent letter of recommendation and employment verification, which documents formed the basis for Counts Two and Three of the indictment against Haimowitz.

The loan proposal was submitted to several Jacksonville-area banks, including the American National Bank, where defendant Bacon was employed as a Vice-President. The American National Bank ultimately approved the loan, with Abbott as sole owner of the restaurant. Defendant Bacon had the application hand carried to the SBA office.

The SBA agreed to insure the loan if Abbott used $210,000 of his personal funds as capital injection, obtained insurance, provided a bondable contrator and architect, and had the liquor license transferred. Additionally, of the $450,000 the bank agreed to loan, $192,847 was earmarked to be spent on renovating and remodeling the restaurant. Construction funds were to be retained in escrow by the bank and money released through draws supplied by the contractor.

Various instruments prepared by Haimowitz and used to feign compliance with the loan terms formed the basis for various counts of the indictment against Haimowitz. These included (1)

a forged receipt for $30,000 as down payment received for renovation and remodeling work (Counts Five and Nine); (2) a forged receipt for $161,304 as payment received for restaurant inventory and equipment purchases (Counts Six and Eight); and (3) a forged receipt for $24,822.33 as prepaid insurance premiums (Counts Seven and Ten).

On January 4, 1980, the loan closing was held at the law offices of the attorney for American National Bank. Of the $450,000 loan, about $170,000 was disbursed to the sellers, about $75,000 was given to Abbott as working capital, and $192,847 was held by the bank in escrow for construction work.

When the original contractor could not provide the required performance bond, Haimowitz met with defendant Harold Bloom, president of Blosam Contractors, Inc., who agreed to sign a "stipulated sum" contract whereby the necessary construction work would be done for $192,847. It was agreed, however, that Blosam would do the work for $100,000, and the remainder would be kicked back to Abbott and Haimowitz. Three draws were made from the bank for the renovation work, for which Abbott would receive from the bank a check payable to Abbott and Blosam. Thereafter, Blosam paid a portion of each check to Abbott, who in turn paid a portion of the kickback to Haimowitz, to-wit: $20,000 to $25,000.

Although Haimowitz was not charged in the substantive counts based on this kickback scheme, this scheme, together with the SBA loan, formed the basis of the conspiracy count (Count One) against Haimowitz.

I. DENIAL OF MOTION TO SUPPRESS

Appellant contends that prejudicial error resulted from the district court's denial of appellant's motion to suppress evidence seized from his law office. As a result of the denial, the Government introduced as evidence Haimowitz's personal files of (1) Abbott's SBA loan application; (2) the incorporation of Abbott's Restaurant; (3) various suits by creditors against Abbott; (4) Haimowitz's personal notebooks of telephone messages; and

(5) copies of letters to various persons. Appellant offers five reasons for which the search warrant should have been held improperly issued.

A. Staleness of Probable Cause

The Affidavit for Search Warrant avers that Peter Abbott stated that on or about July 22, 1980 he was in Haimowitz's office and observed a file containing many documents relating to the loan application in question herein. Judi Greenhut, a former secretary of appellant, also stated that as of June, 1980, there existed a file in Haimowitz's office containing the loan documents in question. The affidavit was signed August 21, 1980.

The appellant maintains that because there was a seven and one-half month time lapse between the loan closing on January 4, 1980 and the August 21, 1980 date of the affidavit, the information contained in the affidavit was stale.

In United States v. Weinrich, 586 F.2d 481 (5th Cir. 1978), cert. denied, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979), the appellants, convicted on drug conspiracy charges, argued that information relied upon in a wiretap application was fatally stale. The first informant's tip was given on November 10, 1976, one hundred days prior to the application, and the second tip came on January 18, 1977, thirty days prior to the application.

In upholding the legality of the wiretap, the court noted:

The function of a staleness test in the search warrant context is not to create an arbitrary time limitation within which discovered facts must be presented to a magistrate. Rather, the assay focuses on one relevant part of the determination that reasonable probable cause exists to warrant the issuance of an order to perform a wiretap or make a search. Out-of-date information as to a single transaction could be seen to describe no more than an isolated event in the past. Such an affidavit would not create probable cause to believe that similar or other improper conduct is continuing to occur. On the other hand, information which demonstrates a chain of related events covering a broad span of time continuing to the current period may furnish a most reliable indicia of present activity, thereby clearly demonstrating that probable cause exists for the order to intrude.

* * * * * *

"In general, the basic criterion as to the duration of probable cause is the inherent nature of the crime. The Circuits hold that where an affidavit recites a mere isolated violation it is not unreasonable to believe that probable cause quickly dwindles

> with the passage of time. On the other hand, if an affidavit recites activity indicating protracted or continuous conduct, time is of less significance."

Id. at 491 (quoting Bastida v. Henderson, 487 F.2d 860, 864 (5th Cir. 1973)). In the present case, information regarding the presence of fraudulent documents in Haimowitz's office was as recent as one month before the affidavit was signed. Further, the nature of the offense charged and the place searched compel the conclusion that the information in the affidavit was not stale. The documents in question reasonably could lead a person to conclude that they pertained to activities the records of which were likely to be maintained in the office. See list infra. This

conclusion is further supported by the statement of Haimowitz's former secretary, Judi Greenhut, who averred that the practice of the office was to maintain documents indefinitely. It was not unreasonable for the issuing magistrate to conclude that the documents were present in Haimowitz's office as of the date of the application.

B. Aguilar/Spinelli Challenge

In order to withstand fourth amendment scrutiny, the affidavit must provide the magistrate with enough essential facts to enable him to exercise his independent judgment and perform his function as a detached and neutral magistrate. See Spinelli v. United States, 393 U.S. 410, 415, 89

S.Ct. 584, 588, 21 L.Ed.2d 637 (1969); Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964).

Aguilar devised a two-part test of the sufficiency of an affidavit based on hearsay information: first, the affidavit must provide information regarding the reliability of the information provided by the informant; second, the affidavit must provide information regarding the credibility of the informant. See United States v. Lefkowitz, 618 F.2d 1313, 1316 (9th Cir.), cert. denied, 449 U.S.824, 101 S.Ct. 86, 66 L.Ed.2d 27 (1980).

As in Lefkowitz, the affidavit in question indicates that Abbott personally observed the documents in question in Haimowitz's office. The

affidavit further relates events at which Abbott was himself present. This satisfied the first Aguilar requirement.

The affidavit does not set forth the fact that Abbott himself had been convicted of felonies and engaged in numerous bad acts. Nevertheless, the affidavit here contains much data that point to Abbott's credibility. The affidavit contains detailed, firsthand information that is specific in its allegations, and is therefore "self-corroborating." Lefkowitz, 618 F.2d at 1316 (quoting United States v. Banks, 539 F.2d 14, 17 (9th Cir.), cert. denied, 429 U.S. 1024, 97 S.Ct. 644, 50 L.Ed.2d 626 (1976)). See also Spinelli, 393 U.S. at 417, 89 S.Ct. at

589. Some information supplied by Abbott, particularly with respect to the presence of fraudulent documents in Haimowitz's office, is corroborated in the affidavit by statements made by Judi Greenhut, Haimowitz's former secretary, whose credibility is unassailed.

We conclude that the affidavit is sufficient on its face to support the finding of probable cause made by the magistrate.

C. Franks v. Delaware Challenge

Haimowitz argues that the affidavit is insufficient because the omission pf facts concerning Abbott's prior felony convictions and bad acts may have led the magistrate to a misconception of Abbott's credibility.

In Franks v. Delaware, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the court held that in order to challenge a facially valid affidavit,[3]

> the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons.

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[3] In Franks, the high court specifically addressed the question of when a defendant is entitled to an evidentiary hearing regarding an affidavit in support of a search warrant. Id., 438 U.S. at 155, 156, 98 S.Ct. at 2676. The Franks rationale, however, has been used to test the validity of a search warrant on appeal. See United States v. Astroff, 578 F.2d 13 (5th Lefkowittz, 618 F.2d at 1317. Astroff is binding precedent in this court. Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

> Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernment informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required.

Id. at 171, 172, 98 S.Ct. at 21684 (footnote omitted).

At the outset, we note that Haimowitz's motion to suppress contains nothing more than conclusory allegations, unaccompanied by any offer of proof, that by his omission[4] the

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[4] Franks dealt with an affirmative false statement, rather than an omission as in the present case. Because there appears no reason to

affiant intended to mislead the magistrate with respect to Abbott's credibility. Appellant claimed that "the affiant signing the Affidavit for Search Warrant intentionally misled the issuing magistrate as to the reliability of the informant, Peter R. Abbott." He asserted as "inescapable" the conclusion that such must have been the intent. He argued there was not "one single averment on the affiant's part as to Peter R. Abbott's reliability, an oddity in and of itself when an affidavit for a search warrant

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differentiate between an affirmative statement and a misleading omission, we assume, without deciding, that the principles of Franks permits an attack on warrants allegedly deficient as a result of such an omission. See Lefkowitz, 464 F.Supp. 227, 233 (C.D.Cal. 1979); aff'd, (9th Cir.) 618 F.2d 1313, 1317 n.3.

is based on hearsay information from an informant." The reason for the affiant's deletion of this area, it is alleged, "is that affiant, an agent of the Federal Bureau of Investigation, knew Peter R. Abbott was about as unreliable a person as has ever been known." Appellant contended that the F.B.I. had had contact with the individual called Peter R. Abbott for years, and at the time of the execution of the affidavit, knew of his extensive criminal record. These were conclusory allegations, unsupported by an offer of proof.

Further, we conclude that even if the magistrate had know of Abbott's prior acts, the affidavit would still have supported a finding of probable

cause for the reasons set forth supra, i.e., the firsthand character of Abbott's statements, coupled with Judi Greenhut's corroboration.

D. "Mere Evidence"

Appellant's fourth reason for asserting that the search warrant was illegal is that the papers were "mere evidence" of a crime, rather than instrumentalities of the crime, fruits, or contraband, and they could not be seized under Gouled v. United States, 255 U.S. 298, 310, 41 S.Ct. 261, 265, 65 L.Ed. 647 (1921). This distinction prohibiting seizure of items with only evidential value and allowing seizure of instrumentalities, fruits, or contraband was rejected by the Supreme Court in Warden v. Hayden, 387 U.S.

294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967). See Fed.R.Crim.P. 41(b) (property constituting evidence of a crime may be subject to seizure under a search warrant).

The appellant also argues that the admission into evidence of his papers effectively compelled him to testify against himself in violation of the fifth amendment, citing Boyd v. United States, 116 U.S. 616, 6 S.Ct. 524, 29 L.Ed. 746 (1886) and Gouled v. United States, 255 U.S. 298, 306, 41 S.Ct. 261, 264, 65 L.Ed. 647 (1921). The Supreme Court rejected this argument in Andresen v. Maryland, 427 U.S. 463, 96 S.Ct. 2737, 49 L.Ed.2d 627 (1976), holding that the search of the attorney's office for business records,

their seizure, and subsequent introduction into evidence did not violate the fifth amendment. Although the records in Andresen contained incriminating statements the attorney had voluntarily committed to writing, he was never required to say or produce anything, and no compulsion to speak, other than inherent psychological pressure to respond at trial to unfavorable evidence, was present.

E. General Search

The appellant's final argument is also meritless. Appellant avers that the search warrant constituted a "general search", see, e.g., Berger v. New York, 388 U.S. 41, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), in that the documents listed in the affidavit were

available either in the public records or in a collateral file maintained by the American National Bank, or the affidavit failed to show probable cause to believe that certain documents were actually in Haimowitz's office.

The warrant provided for the seizure of the following items from Haimowitz's office:

> Description of Property to be seized:
>
> 1. The following items pertaining to the application of Abbott's Restaurant, Inc., also known as Abbott, Inc. and Abbott's Restaurants, Inc. for a $450,000 loan from the American National Bank of Jacksonville and for a Small Business Administration guarantee of that loan:
>
> loan applications; lists of collateral; letters on "Hotels of Distinction" stationery signed by Virginia Blasi; contracts for the purchase and sale of Swain's Steakhouse; receipts for the purchase of

restaurant equipment; letters and receipts from Morris, Gordon & Sons; personal history statement of Peter Abbott; contracts and quotes for the remodeling of Swain's Steakhouse; Small Business Administration statements regarding preconditions to be satisfied by the borrower before the issuance of the loan; disbursement sheets; correspondence and memoranda regarding arrangements to pay money to Fred Bower of the Small Business Administration and to Fred Bacon of the American National Bank of Jacksonville in connection with approval of the loan and loan guarantee; cards in the Roledex file on the secretary's desk nearest to the door to Harold Haimowitz' personal office containing the names of officials of the Small Business Administration; correspondence and memoranda regarding arrangements to have Paul Arkin do an appraisal of property located at 5800 Phillips Highway, Jacksonville, Florida; books and records showing the amount and disposition of monies paid to Harold Haimowitz by Peter Abbott; blank stationery of Hotels of Distinction and Morris, Gordon & Sons;

telephone messages from Fred Bower, Fred Bacon, Harold Bloom, Peter Abbott and Paul Arkin during the period from October 1979 through June 1980; books records, and documents showing or tending to show an intent to deceive and/or knowledge of false statements made to the American National Bank of Jacksonville and to Small Business Administration on the part of Harold Haimowitz, together with other fruits, instrumentalities, and evidence of crime described in the attached affidavit.

2. The black IBM Selectric typewriter with self-correcting feature which is located on the secretary's desk used by Theresa Pinson, said desk having Theresa Pinson's name plate thereon, which is located in the common office area of Suite 1001, is on the Bay Street side of the common area and is on the second secretary's desk from the end of the common area on the right hand side as determined by facing Bay Street.

Compare Andresen, supra, 427 U.S. at 480 n. 10, 96 S.Ct. at 2748 n. 10, wherein a similar list was held not to

constitute a "general warrant". The observations of the Supreme Court in Andresen are particularly relevant in the case sub judice:

> Petitioner also suggests that the specific list of the documents to be seized constitutes a "general" warrant. We disagree. Under investigation was complex real estate scheme whose existence could be proved only by piecing together many bits of evidence. Like a jigsaw puzzle, the whole "picture" of petitioner's false pretense scheme with respect to Lot 13T could be shown only by placing in the proper place the many pieces of evidence that, taken singly, would show comparatively little. The complexity of an illegal scheme may not be used as a shield to avoid detection when the State has demonstrated probable cause to believe that a crime has been committed and probable cause to believe that evidence of this crime is in the suspect's possession. The specificity with which the documents are named here contrasts sharply with the absence of particularity in Berger v. New York, 388 U.S. 41, 58-59 [87 S.Ct. 1873, 1883, 18 L.Ed.2d 1040] (1967), where a state

> eavesdropping statute which authorized eavesdropping "without requiring belief that any particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described," was invalidated.

Id.

The warrant in question narrowed and identified the documents subject to seizure, thereby minimizing the danger of a random search. It also identified with adequate particularity the conspiracy under investigation. See United States v. Bithoney, 631 F.2d 1, 2 (1st Cir. 1980), cert. denied, 449 U.S. 1083, 101 S.Ct. 869, 66 L.Ed.2d 808 (1981).

The court finds no merit to appellant's argument that the fact that the documents sought were available from other sources renders the warrant

an impermissible general search. General warrants, allowing "a general, exploratory rummaging in a person's belongings," are prohibited by the requirement of a "'particular description' of the things to be seized." Andresen, 427 U.S. at 480, 96 S.Ct. at 2748 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038, 20 L.Ed.2d 564 (1971)). This requirement was met in the present case. There is no allegation of general rummaging in Haimowitz's office outside the scope of the warrant's authorization. The specificity present in the description of property to be seized obviated the problem of a general search. See Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 511,

13 L.Ed.2d 431 (1965) (The specificity requirement "'makes general searches ... impossible and prevents the seizure of one thing under a warrant describing another.... [N]othing is left to the discretion of the officer executing the warrant.'") (quoting Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)), quoted in Andresen, 427 U.S. at 480, 96 S.Ct. at 2748.

II. RESTRICTION OF CROSS-EXAMINATION

Appellant next complains that his right to confrontation, U.S. Const. Amend. VI, was violated when the district court limited his cross-examination of witness Abbott. In particular, appellant sought to impeach Abbott's credibility with respect to

his testimony that Haimowitz had instigated many of the legal acts, by demonstrating that Abbott had previously engaged in the execution of fraudulent documents in Huntsville, Alabama, involving a lawyer and his secretary. Appellant also complains that efforts to cross-examine Abbott on matters relating to (1) the source of monies invested in the restaurant venture, (2) prior fraudulent bank loans involving Abbott, and (3) governmental protection of Abbott's assets from judgment creditors were either prohibited or severely limited by the district court.

Serious restrictions of a defendant's right to cross-examine a witness can eviscerate the defendant's

sixth amendment right to confront adverse witnesses and compel the reversal of a conviction. United States v. Berkowitz, 662 F.2d 1127, 1138 (5th Cir. 1981) (citing Davis v. Alaska, 415 U.S. 308, 315-18, 94 S.Ct. 1105, 1109-10, 39 L.Ed.2d 347 (1974)). Although the extent of cross-examination on an appropriate subject is within the sound discretion of the trial court and will not be disturbed on review unless there is abuse of such discretion, there is "a sphere which a trial judge may not impinge, for the 'discretionary authority to limit cross-examination comes into play only after there has been permitted as a matter of right sufficient cross-examination to satisfy the Sixth

Amendment.'" United States v. Tolliver, 665 F.2d 1005, 1008 (11th Cir.), cert. denied sub nom. Hawkins v. United States, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978)), cert. denied, --- U.S. ---, 102 S.Ct. 1991, 75 L.Ed.2d --- (1982).

We have carefully examined the record and conclude that the district court gave the appellant ample opportunity to cross-examine Abbott and expose facts from which the jury could draw fair inferences regarding Abbott's credibility. The district court limited detailed excursions into collateral matters; this was a proper exercise of the district court's discretion and did not deprive the defendant of his rights to

confrontation. See United States v. Cohen, 631 F.2d 1223, 1226 (5th Cir. 1980). The appellant was able to achieve his desired purpose of impeaching Abbott's testimony despite specific restrictions placed on his cross-examination by the trial court.[5]

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[5] As a result of the district court's evidentiary rulings, the jury was given ample information from which to draw inferences regarding Abbott's reliability. The jury knew Abbott's testimony was given under an agreement with the government whereby Abbott was to plead guilty to a single count in a related case in return for freedom from prosecution on any of the offenses arising out of the present case. The jury was also aware that Abbott's sentencing on the guilty plea had been continued, and that the sentencing judge would be advised of his cooperation with the government.

With regard to prior offenses, the jury was informed that Abbott had eight criminal convictions in Boston, Massachusetts and one criminal conviction in Jacksonville,

See United States v. Lewis, 676 F.2d 508, 512 (11th Cir.), cert. denied, --- U.S. ---, 103 S.Ct. 313, 74 S.Ct. 291 (1982). Appellant's claim that the

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Florida. In addition to convictions, the jury knew that Abbott had been the middleman in a Boston cocaine transaction, had had an automobile burned in Boston, and had received other fraudulent bank loans, which were repaid out of insurance funds following fraudulent arson, in Boston.

The jury was also cognizant of the details of Abbott's involvement in governmental immunity programs. The jury knew that Abbott received immunity in Boston for all crimes he disclosed to authorities, that at the time of trial he was being paid $1,300 per month and had been paid $11,000 during the previous 10-11 months by the government, and that he had been relocated by the government under an assumed name. The jury was also aware that the government would attempt to place Abbott on the Witness Protection Program for his assistance in this case, wherein during a previous tenure Abbott had received $29,000 from the goverment.

trial court "constant[ly] limit[ed]" his cross-examination of Abbott is not supported by the record.

III. DENIAL OF SURREBUTTAL

Appellant's third specification of error is that the district court committed prejudicial error in refusing to allow the defendant the opportunity to find and present good character witnesses in surrebuttal to counter the character testimony of two listed government witnesses presented in rebuttal.

Appellant had taken the witness stand to deny the allegations of his involvement in the loan scheme. The government called two witnesses in rebuttal, Herbert Kanning, a Jacksonville attorney who had known the

appellant for ten years, and Thomas D. Treece, a Jacksonville attorney who had previously been a law partner of the appellant. Both witnesses testified adversely to the appellant's reputation in the community for truth and veracity and as to their own opinion regarding the appellant's credibility.

After the government closed, there was a side bar conference regarding procedural matters unrelated to this appeal. The district judge then informed the jury that the presentation of testimony and evidence had concluded, and dismissed them until the next morning. The defendant's attorney then stated that he would like to have "some time to locate at the most two witnesses to testify" regarding the

defendant's credibility. The district court agreed with the prosecution that surrebuttal was within the discretion of the court, and denied that request, further noting that "the Court having announced that the testimony and evidence had been concluded would perhaps attach undue significance to that presentation."

"Although a criminal defendant cannot be compelled to take the stand in his own defense, once he chooses to testify 'he places his credibility in issue as does any other witness.'" United States v. Lollar, 606 F.2d 587, 588 (5th Cir. 1979) (citations omitted). Thus, the district court correctly allowed the government to call witnesses to testify that the

defendant's reputation for truth and veracity were bad and as to their own opinion regarding the defendant's credibility. Id. at 588, 589.

Whether or not to allow evidence in surrebuttal is a matter within the sound discretion of the district court; the district court's decision not to allow surrebuttal may not be disturbed unless such discretion was abused. See, e.g., United States v. Sadler, 488 F.2d 434, 435 (5th Cir.) (per curiam), cert. denied, 417 U.S. 931, 94 S.Ct. 2642, 41 L.Ed.2d 234 (1974). In the present case, the trial court properly limited the rebuttal witnesses' testimony to the defendant's reputation and the witnesses' opinions regarding his truth and veracity. This prevented

the government from introducing new matters that may have prompted the need for surrebuttal on behalf of the defense. See id. Because the issue of the defendant's truthfulness was placed in issue upon his testimony, the government injected no new issue, and there was no abuse of the trial court's discretion to deny surrebuttal.

IV. SINGLE v. MULTIPLE CONSPIRACIES

Appellant's final contention is that the district court erred in failing to grant appellant's motion to dismiss Count One for duplicity. See generally Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). Appellant specifically urges that the "first" conspiracy concerned the acts leading to the obtaining of

the SBA loan, the "second" relating to the acts surrounding the subsequent use of the proceeds.

The Fifth Circuit has consistently held that a single conspiracy may exist "even though the agreement that constitutes it has several objectives and aims at the commission of several offenses." United States v. Rodriguez, 585 F.2d 1234, 1249 (5th Cir.1978) (citing United States v. Elliot, 571 F.2d 880 (5th Cir.1978), aff'd on rehearing, 612 F.2d 906 (5th Cir.) (en banc), cert. denied sub nom. Albernaz v. United States, 449 U.S. 835, 101 S.Ct. 108, 66 L.Ed.2d 41 (1980). An examination of the indictment reveals the true character of the conspiracy charged herein. The acts alleged

leading up to the obtaining of the loan were the necessary precursors to the acts performed to reduce the loan monies to possession. The indictment charges only one overall conspiracy in which Haimowitz was involved at each stage.

AFFIRMED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

HAROLD HAIMOWITZ, Defendant-Appellant

No. 81-6011

United States Court of Appeals,
Eleventh Circuit.

Aug. 15, 1983

Appeal from the United States District Court for the Middle District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion June 13, 1983, 11 Cir., 1983, 706 F.2d 1549)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and PITTMAN,[6] District Judge.

PER CURIAM:

Appellant Harold Haimowitz requests a rehearing/rehearing en banc based inter alia on the contention that this court's treatment of the issue of probable cause is in conflict with the Supreme Court's opinion in Illinois v. Gates, --- U.S. ---, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).

Subsequent to the preparation of our opinion in this appeal, the United States Supreme Court announced its

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[6] Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

opinion in Illinois v. Gates. In that case the legal tests announced in Aguilar v. Texas, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and Spinelli v. U.S., 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969) were disapproved and replaced with a single "totality of circumstances" test that intertwines the factors that illuminate the probable cause issue in evaluating the sufficiency of search warrant affidavits based on informant's allegations. See id., --- U.S. at --- ---, 103 S.Ct. at 2324-28.

The court has re-examined the totality of circumstances surrounding the issuance of the search warrant in

the instant case and concludes that the affidavit supporting that search warrant was sufficient.

The remaining contentions are without merit.

The petition for rehearing is DENIED and no member of this panel nor judge in regular active service of the court having requested that the court be polled on rehearing en banc (Rule 35, Fed.R.App.P; Eleventh Circuit Rule 26), the suggestion for rehearing en banc is DENIED.

Office-Supreme Court, U.S.
FILED
DEC 20 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-581

In the Supreme Court of the United States

OCTOBER TERM, 1983

HAROLD HAIMOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the circumstances of this case, the trial judge abused his discretion in refusing to grant petitioner's request for the time to locate and the opportunity to call surrebuttal witnesses to support petitioner's character for truthfulness.

2. Whether a search warrant affidavit must disclose all known evidence reflecting adversely on an informant and whether a warrant that does not contain such information is defective even if it would still support probable cause if all such information were included.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-581

HAROLD HAIMOWITZ, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A48) is reported at 706 F.2d 1549.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1983. A petition for rehearing was denied (Pet. App. A50-A52) on August 15, 1983. The petition for a writ of certiorari was filed on October 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of conspiracy to embezzle

by filing false loan applications with the Small Business Administration, in violation of 18 U.S.C. 371; four counts of making false statements, in violation of 18 U.S.C. 1001; and four counts of possessing false documents with intent to defraud the United States, in violation of 18 U.S.C. 1002. Petitioner was sentenced to five years' imprisonment followed by a two-year period of probation. He was also fined $20,000. The court of appeals affirmed (Pet. App. A1-A48).

The facts underlying petitioner's convictions are set forth fully in the opinion of the court of appeals and may be briefly summarized as follows. Pet. App. A4-A14. Petitioner was an attorney in Jacksonville, Florida. In the fall of 1979, Peter Abbott sought petitioner's assistance in locating a restaurant for sale in the $50,000 to $100,000 price range. Petitioner put Abbott in contact with the chairman of the local zoning board, who arranged for Abbott to see several restaurants, including Swain's Charbroiled Steakhouse, which was priced at between $300,000 and $325,000. Petitioner told Abbott that he might be willing to invest personally in the restaurant. After petitioner and Abbott had inspected the restaurant, petitioner offered to take a 10% ownership interest, with the financing for the purchase and renovation to be obtained through a Small Business Administration (SBA) loan. Abbott told petitioner that he could not get an SBA loan because of his previous bankruptcy and his record as a convicted felon. Nevertheless, Abbott agreed to have an SBA loan "packaged" by Robert Flude of Atlanta while petitioner attended to the details necessary for closing the sale. Petitioner negotiated the price with representatives of the restaurant's owners. Abbott supplied false background information to Flude for the loan package. Petitioner

also dealt with Flude, directing certain changes in the loan package in order to make it more attractive to the SBA. The loan package was forwarded from Flude to Abbott and then to petitioner, who provided the additional documents—the purchase agreement, property appraisals, insurance breakdowns, and an inflated estimate for the renovation work. Abbott also prepared and included with the package a fraudulent letter of recommendation (the basis for Count Two) and a fradulent employment verification (the basis for Count Three).

The loan proposal, for $450,000, was submitted to several banks and was ultimately approved by the American National Bank, where co-defendant Frederick Bacon was a vice-president. Bacon forwarded the loan proposal to the SBA which agreed to insure the loan if Abbott used $210,000 of his personal funds on the project, obtained insurance, provided a bondable architect and contractor, and arranged to transfer the liquor license. In addiiton, $192,847 of the $450,000 was to be held in escrow to be released through draws by the contractor. Petitioner prepared various false documents to feign compliance with the terms of the loan. These included a forged receipt for $30,000 as down payment on renovation work (the basis for Counts Five and Nine) and a forged receipt for $161,304 for inventory and equipment purchases (the basis for Counts Six and Eight).

The loan was closed on January 4, 1980. Of the $450,000 loan, about $170,000 was paid to the sellers, about $75,000 was given to Abbott as working capital, and $192,847 was held by the bank in escrow for construction work. When the original contractor could not provide a performance bond, petitioner met with co-defendant Harold Bloom, president of Blosam

Contractors, Inc., who agreed to sign a contract to do the work for a "stipulated sum" of $192,847. It was agreed, however, that Blosam would do the work for $100,000 and kick back the remainder to Abbott and petitioner. Petitioner received approximately $20,000 to $25,000 in kickbacks. Petitioner was not indicted on substantive charges of receiving kickbacks, but the kickback scheme was charged as part of the conspiracy.

ARGUMENT

1. Petitioner contends (Pet. 8-19) that the district court erred in refusing to permit him to present surrebuttal testimony supporting his credibility as a witness.

Petitioner testified in his own behalf at trial but chose not to present character witnesses in his defense case-in-chief. As petitioner's counsel noted at trial, this was a considered decision (Tr. 8157). Other defendants called character witnesses at that time. In rebuttal, the government called two witnesses who testified briefly that petitioner's reputation for truthfulness was not good and that in their opinion he was not truthful. After the government had rested, a sidebar conference regarding unrelated procedural matters took place. Tr. 8169-8173. Petitioner made no indication that he wished to call surrebuttal witnesses. The district court then announced that the presentation of evidence had concluded and dismissed the jury for the night.[1] Tr. 8174. Only then did petitioner's counsel request "some time to locate at the most two witnesses to testify" regarding petitioner's

[1] Petitioner's suggestion (Pet. 6) that the district court did not afford him an opportunity to request surrebuttal prior to announcing the close of the evidence is not supported by the record (Tr. 8169-8175).

credibility. Tr. 8175. The district court declined to reopen the testimony in view of the possibility that the jury might give undue weight to new evidence received after the announced close of the case (Pet. App. A42-A44; Tr. 8174-8175).

Whether to allow the presentation of evidence in surrebuttal is a decision left to the sound discretion of the district court. *United States* v. *Wilford*, 710 F.2d 439 (8th Cir. 1983); *United States* v. *Durnin*, 632 F.2d 1297 (5th Cir. 1980); *United States* v. *Sadler*, 488 F.2d 434 (5th Cir.), cert. denied, 417 U.S. 931 (1974); *Turner* v. *United States*, 441 F.2d 736 (5th Cir. 1971). There was no abuse of discretion by the district court in this case.

Petitioner argues (Pet. 8-19) that the district court should have permitted him to call surrebuttal witnesses to respond to the government's attack upon his credibility. We do not dispute the contention that such testimony should at times be allowed when the prosecution presents rebuttal testimony attacking the defendant's character for truthfulness by opinion or reputation evidence (see Fed. R. Evid. 608(a)(2)). However, under the facts of this case, the district court did not abuse its discretion.

First, although petitioner had the opportunity to do so, he did not express any desire to call surrebuttal witnesses until after the court had announced that presentation of evidence had ended. The trial judge concluded that permitting petitioner to reopen would place undue emphasis upon the surrebuttal testimony. This was a determination peculiarly within the province of the trial judge.

Second, petitioner requested not only permission to call surrebuttal witnesses but also "some time to locate" such witnesses. Thus, petitioner's request would have resulted in delay of unknown duration.

Finally, as the court of appeals observed (Pet. App. A46), the government witnesses who attacked petitioner's character for truthfulness did not inject any new issue into the case. Petitioner had been charged with numerous offenses involving false statements, and thus his character for truthfulness was at issue even before he took the stand.

Petitioner could have presented evidence regarding his truthful character as part of his case-in-chief. Fed. R. Evid. 404(a)(1); *Edgington* v. *United States*, 164 U.S. 361, 363 (1896); *United States* v. *Hewitt*, 634 F.2d 277, 279 (5th Cir. 1981); *Darland* v. *United States*, 626 F.2d 1235, 1238 (5th Cir. 1980), cert. denied, 454 U.S. 1157 (1982). For tactical reasons, he elected not to do so. Indeed, he apparently did not even locate such witnesses (assuming there were any to be found) so that they could be called without delay if he later changed tactics. The evidence against petitioner was not so fundamentally changed as a result of the rebuttal testimony in question that the district court was bound to permit petitioner to reopen his case and delay submission of the case to the jury until surrebuttal witnesses could be located.

2. Petitioner contends (Pet. 20-30) that the warrant authorizing the search of his office was defective because the affidavit relied upon information supplied by Peter Abbott but failed to disclose information known to the government that indicated that Abbott was not a reliable informant. There is no merit to this claim.

Pursuant to a search warrant issued on August 21, 1980, various documents were seized from petitioner's law office and later introduced in evidence at trial. These documents included petitioner's files concerning

Abbott's SBA loan application, the incorporation of Abbott's restaurant and various suits by creditor's against Abbott, as well as petitioner's notebooks of telephone messages and copies of letters to various persons (Pet. App. A14-A15). The affidavit supporting the application for the search warrant recited information provided by Abbott and by Judi Greenhut, a former employee of petitioner. Abbott described the events leading up to the January 1980 SBA loan fraud. He also stated that, as recently as July 22, 1980, he had personally observed various documents relating to the fraud in a file in petitioner's office (Search Warrant 3-4). Greenhut confirmed that, as of June 1980, the files containing the loan documents were in petitioner's office and that it was the practice in petitioner's office to retain such documents indefinitely (Search Warrant 5-6). Pet. App. A15.

Petitioner complains (Pet. 23-25) that the search warrant affidavit omitted information that was known to the government and that, if disclosed, would have cast doubt upon Abbott's credibility. Relying on *Franks* v. *Delaware*, 438 U.S. 154 (1978), which concerned an affidavit alleged to contain deliberately or recklessly false statements, petitioner argues (Pet. 29) that a hearing "must be held to allow [him] to prove * * * that the FBI affidavit intentionally or recklessly withheld information material to the issue of probable cause." Petitioner's argument would extend *Franks* far beyond cases in which the prosecution has made an affirmative misrepresentation in applying for a search warrant to cases in which the government merely failed to disclose information bearing upon an informant's credibility. No court of appeals has accepted this argument, and it would plainly be unworkable. Requiring the government to

compile and disclose in a search warrant affidavit all the evidence in its possession that might undermine an informant's credibility or otherwise negate a finding of probable cause would be extremely burdensome and time-consuming and would frequently make it impossible for the government to apply for a warrant within the time limits imposed by the needs of fast-paced investigations. See *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), slip op. 20-21. Consequently, if petitioner's rule were adopted, "police might well resort to warrantless searches" (slip op. 21).

Not only would it be a formidable task to locate, assemble, and present all evidence that might have a bearing upon an informant's credibility, but disclosure of such information can sometimes endanger the informant or jeopardize an ongoing investigation. At trial, when an informant is called as a witness, such possibilities must be carefully assessed. But the government cannot reasonably be expected to make decisions regarding such matters during the often hectic process of preparing a search warrant application.[2] As this Court recently reiterated, search warrant affidavits " 'are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity * * * have no

[2] No such duty to disclose applies in other probable cause determinations, such as the return of an indictment. For example, although a prosecutor may not deliberately mislead a grand jury (*United States* v. *Lame*, 716 F.2d 515, 518 (8th Cir. 1983)), the prosecutor clearly is not required to present all evidence bearing upon the credibility of grand jury witnesses (*United States* v. *Al Mudarris*, 695 F.2d 1182, 1185 (9th Cir.), cert. denied, No. 82-6149 (May 16, 1983)). There is no basis for imposing such a requirement when an application is made for a search warrant. Even greater dispatch is required in this context.

proper place in this arena.'" Slip op. 20 (quoting *United States* v. *Ventresca*, 380 U.S. 102, 108 (1965)).[3]

In any event, even if *Franks* were extended to impose a duty to disclose, suppression of the seized evidence would not be required. *Franks* stated that even where an affidavit contains deliberate or reckless falsehoods, suppression of evidence is not required unless the false statements were needed to establish probable cause. Here, the court of appeals concluded that even if all the adverse evidence regarding Abbott's credibility had been placed in the affidavit, it would still have established probable cause (Pet. App. A26-A27).[4] As the court noted, "[t]he affidavit con-

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[3] Petitioner's reliance on *Illinois* v. *Gates*, No. 81-430 (June 8, 1983), is far-fetched. *Gates* abandoned the rigid two-pronged test adopted in *Aguilar* v. *Texas*, 378 U.S. 108 (1964), and *Spinelli* v. *United States*, 393 U.S. 410 (1969), for determining whether an informant's tip establishes probable cause for issuance of a warrant. In its place, *Gates* "reaffirm[ed] the totality of the circumstances analysis that traditionally has informed probable cause determinations" (slip op. 23). Petitioner's rule would be completely inconsistent with the traditional approach to probable cause determinations. Moreover, *Gates* emphasized that search warrant affidavits are typically prepared in haste by nonlawyers and that elaborate technical rules should not be imposed (slip op. 20-21).

[4] Petitioner incorrectly suggests (Pet. 30) that all the information supplied by Abbott would have to be struck if *Franks* were extended to impose a duty to disclose. *Franks* did not require the striking of all the information supplied by an affidavit found to contain deliberate or reckless false statements. Instead, the Court merely required that the false statements be excluded in assessing probable cause. If, as petitioner maintains, the failure to disclose is tantamount to a misrepresentation, then the appropriate remedy where there has been such a failure is to include the omitted information in assessing probable cause.

tain[ed] detailed, firsthand information that is specific in its allegations, and is therefore 'self-corroborating' " (*id.* at A21, A27), and some of the information supplied by Abbott was "corroborated in the affidavit by statements made by Judi Greenhut, [petitioner's] former secretary, whose credibility is unassailed" (*id.* at A22, A27).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 428909 199

No. 83-581

Office-Supreme Court, U.S.
FILED
JAN 3 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

October Term, 1983

HAROLD HAIMOWITZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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No. 83-581

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1983

HAROLD HAIMOWITZ,

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O PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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REPLY BRIEF OF PETITIONER

INTRODUCTION

Petitioner, a Jacksonville attorney, was tried and convicted on charges arising out of the making,

possession, and filing of false statements and documents in connection with an application for an SBA loan and the disposition of the proceeds of that loan. The loan was made at the behest of a client of Haimowitz', Peter Abbott, who sought the monies to finance the purchase and renovation of a Jacksonville restaurant. Peter Abbott, who testified against Haimowitz, was an experienced con artist who had previously acquired several loans, including SBA loans, through fraud. Haimowitz defended on the ground that he had relied on information provided to him by his client and was unaware of any scheme to defraud.

Petitioner raises two issues for this Court's consideration. Petitioner took the stand on his own

behalf and the prosecution then was permitted to call in rebuttal two witnesses who testified about his poor reputation for truthfulness and their negative opinion as to his truthfulness. The trial court then refused to permit Petitioner to call witnesses who would have testified about his good reputation for truthfulness and their opinion that he was truthful. Petitioner maintains this was error under Rule 608 of the Federal Rules of Evidence and deprived him of due process of law.

Second, a search was conducted of Petitioner's law office pursuant to a warrant supported by an FBI agent's affidavit. The affidavit was based almost entirely on information provided by Peter Abbott. The affidavit however failed to mention

facts known to the government which showed that Peter Abbott was a liar and a fraud. Petitioner claims that, under the decisions of this Court, the failure to disclose rendered the search warrant invalid.

ARGUMENT

I. The Solicitor General's argument in support of the trial court's ruling refusing to permit Haimowitz to present witnesses who would have testified about his truthfulness manages to relegate Rule 608 of the Federal Rules of Evidence, upon which Petitioner relies, to a mere parenthesis. The reason is plain. If the existence and plain meaning of Rule 608 are recognized, the error below is manifest. Only by ignoring the rule can the government justify the ruling by resort to

general doctrines about a trial court's "discretion" with regard to "surrebuttal" testimony.

Discretion, of course, can be properly exercised only in context and here Rule 608 provides the context. That rule provides that after a witness' character for truthfulness has been attacked, evidence of his truthful character is admissible.

Surely, where the witness is a criminal defendant, the opportunity to present such evidence is part of the guarantee of due process. While there may be some room for the exercise of a trial court's discretion,[1] any such

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[1] For example, if a defendant has introduced evidence of his good character under Rule 404 in his case in chief, and the government only then introduced rebuttal testimony, perhaps his Rule 608 testimony could be excluded as cumulative.

discretion cannot be properly exercised absent an understanding of the relevant evidentiary rule and the Constitutional base on which it rests. The trial court failed to consider the controlling rule of evidence; the Court of Appeals, affirming, ignored it as well.

Nor can the trial court's ruling be justified on the ground of avoiding delay -- and here the Solicitor General is misleading. No delay whatsoever (except for whatever time it would have taken for the witnesses to testify) would have been occasioned by permitting defendant's witnesses to testify. The government rested at the very end of the day after it had presented its bad reputation witnesses; the jury was then sent home. The witnesses whom Petitioner

sought to call were available and present in the courthouse the following morning when the trial proceedings resumed.

In any event, the reason the trial court refused to permit the defendant to call his witnesses was not delay. Rather, the court was concerned that, because it had announced the close of evidence, the jury might give undue weight to new evidence received. However, a simple instruction to the jury could have alleviated that concern. In a case where the credibility of the defendant and of his accuser was essentially the only issue to be decided, precluding the defendant from presenting evidence of his good character to counter the government's bad character evidence was highly prejudicial.

II. Petitioner argues that a search warrant based on an affidavit premised almost exclusively on information provided by an informant which omits to disclose information known to the government indicating that the informant is not credible is not valid. The Solicitor General denigrates the claim but it is a direct, logical, and necessary extension of the rule of Franks v. Delaware, 438 U.S. 154 (1972). This Court's recognition of that extension is essential if the magistrate's function is not to be transformed into a sham.

Indeed, the Solicitor General does not seriously dispute the validity of the rule urged by Petitioner, but opposes it on the ground that it would be burdensome and

time-consuming.[2] The rule urged by the Petitioner would not impose on the government a time-consuming and burdensome new duty to investigate its informers, only to disclose to the magistrate information it already possesses. Any burden which this might represent to the government would surely be justified by the enhanced reliability of the magistrate's probable cause determination which could truly be

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[2] The government also suggests that disclosure of information bearing upon an informant's credibility "can sometimes endanger the informant or jeopardize an ongoing investigation," (Brief for the United States at 8) but it is not clear what, if anything, the government means, since the warrant and affidavit may of course be sealed under appropriate circumstances.

based on the totality of the circumstances. See Illinois v. Gates, 103 S.Ct. 2317 (1983).[3]

Finally the government suggests that, in any event, the appropriate remedy would be, not the striking of information supplied by the informant, but the inclusion of the omitted information regarding the informant's lack of credibility and, that, considering that omitted information, the affidavit still establishes probable cause. The government's proposed remedy has the surface appeal of consistency with the Franks rule

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[3] The government's suggestion that if Petitioner's rule were adopted police might resort to warrantless searches (Brief of the United States at 8) is a threat not worthy of the government. Surely, many restrictions imposed by the Fourth Amendment are initially viewed as unnecessary and burdensome by law enforcement agents; in operation, they prove to be wholly workable.

but that application of Franks cannot be the law. First, of course, all of the information in the government's possession still has not been disclosed so it is impossible to consider that information in assessing probable cause. More important, though, the remedy proposed by the government would render the rule requiring disclosure meaningless.

We may assume, for present purposes, that on the basis of the information provided to the magistrate, there was probable cause. But the essence of Petitioner's argument is that, had the magistrate been informed that the informant was a professional liar, he would not have credited any of his factual assertions. The government's argument proceeds on the mistaken assumption

that the omitted material is irrelevant to assessing the information which was provided to the magistrate. If that were so, the failure to disclose would never invalidate the warrant and the rule requiring disclosure would be a nullity.

CONCLUSION

For the reasons stated, Petitioner respectfully prays that this Court grant a writ of certiorari.

Respectfully submitted,

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